

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Ariel Courage	Team: APU	CCRB Case #: 201412315	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Sunday, 06/29/2014 8:30 PM	Location of Incident: 112 East 128th Street	Precinct: 25	18 Mo. SOL 12/29/2015	EO SOL 12/29/2015	
Date/Time CV Reported Thu, 12/11/2014 11:16 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Thu, 12/11/2014 11:16 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POF Kristen Fairclough	3108	954787	PBMN
2. SGT Robert Zagajeski	3245	948535	025 PCT
3. POM Glen Barker	10067	954520	PBMN
4. POM Dustin Dimpflmaier	13054	954736	PBMN
5. POF Elizabeth Antola	9066	954493	PBMN

Officer(s)	Allegation	Investigator Recommendation
A.POM Glen Barker	Force: PO Glen Barker used physical force against § 87(2)(b)	
B.POM Dustin Dimpflmaier	Force: PO Dustin Dimpflmaier used physical force against § 87(2)(b)	
C.POF Elizabeth Antola	Force: PO Elizabeth Antola used physical force against § 87(2)(b)	
D.POF Kristen Fairclough	Force: PO Kristen Fairclough used physical force against § 87(2)(b)	
E.POM Glen Barker	Force: PO Glen Barker struck § 87(2)(b) with an asp.	
F.POM Dustin Dimpflmaier	Force: PO Dustin Dimpflmaier used a chokehold against § 87(2)(b)	
G.POM Dustin Dimpflmaier	Force: PO Dustin Dimpflmaier obstructed the breathing of § 87(2)(b)	
H.SGT Robert Zagajeski	Force: Sgt. Robert Zagajeski used a taser against § 87(2)(b)	

Case Summary

On December 11, 2014, § 87(2)(b) called the CCRB to file a complaint (encl. [3A-B]). On June 29, 2014, at approximately 8:30 p.m., inside 112 East 128th Street in Manhattan, PO Dustin Dimpflmaier, PO Glen Barker, PO Elizabeth Antola, and PO Kristen Fairclough, all of Patrol Borough Manhattan North, attempted to stop § 87(2)(b) for reckless skateboarding. When § 87(2)(b) refused to stop, PO Dimpflmaier, PO Barker, PO Antola, and PO Fairclough used physical force against him (**Allegations A, B, C, and D**). During the struggle, PO Barker struck § 87(2)(b) with an asp (**Allegation E**). PO Dimpflmaier used a chokehold against § 87(2)(b) (**Allegation F**), restricting his breathing (**Allegation G**). Additional officers were called to the scene and Sgt. Robert Zagajeski of the 25th Precinct used a taser against § 87(2)(b) (**Allegation H**). § 87(2)(b) was arrested and charged with § 87(2)(b).

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b).

Mediation, Civil, and Criminal Histories

This case was not eligible for mediation due to § 87(2)(b)'s arrest. § 87(2)(b) has filed a Notice of Claim with regard to this incident claiming personal, emotional, physical injuries and seeking \$1,000,000 as redress (encl. [8A-F]). The criminal case from the arrest of § 87(2)(b) in this incident was resolved on § 87(2)(b), when § 87(2)(b) pled guilty to disorderly conduct (encl. [6A]). § 87(2)(b)

§ 87(2)(b)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint filed by § 87(2)(b) (encl. [2F]).
- PO Dimpflmaier has been a member of the service for one year. This is the first CCRB complaint against him (encl. [2A]).
- PO Barker has been a member of the service for one year. This is the first CCRB complaint against him (encl. [2B]).
- PO Antola has been a member of the service for one year. This is the first CCRB complaint against her (encl. [2C]).
- PO Fairclough has been a member of the service for one year. This is the first CCRB complaint against her (encl. [2D]).
- Sgt. Zagajeski has been a member of the service for five years. This is the first CCRB complaint against him (encl. [2D]).

Findings

Allegations Not Pleaded

- **Stop:** Given that § 87(2)(b) was initially stopped for reckless skateboarding, an offense for which he could have received a summons, and that the situation then escalated to the point of arrest, to plead a stop of § 87(2)(b) would constitute an arrest dispute. It consequently has not been pleaded.

Explanation of Subject Officer Identification

PO Dimpflmaier, PO Barker, and PO Antola acknowledged participating in the apprehension of § 87(2)(b). PO Fairclough is on sick leave indefinitely and as per Medical District 11 is not in a condition to be interviewed (encl. [5L-M]). However, her memo book entries, police documentation of the arrest, video footage, and the statements of all other officers

interviewed indicate that she participated physically in his apprehension. As such, an allegation of physical force has been pleaded against her.

During his CCRB interview, PO Glen Barker identified himself in the video footage as the officer who strikes § 87(2)(b) with an asp. As such, this allegation has been pleaded against him.

PO Dimpflmaier identified himself in the video footage as the officer who places § 87(2)(b) in a chokehold. As such, this allegation has been pleaded against him.

Sgt. Zagajeski acknowledged that he used his taser against § 87(2)(b). As such, this allegation has been pleaded against him.

Allegation A – Force: PO Glen Barker used physical force against § 87(2)(b)

Allegation B – Force: PO Dustin Dimpflmaier used physical force against § 87(2)(b)

Allegation C – Force: PO Elizabeth Antola used physical force against § 87(2)(b)

Allegation D – Force: PO Kristen Fairclough used physical force against § 87(2)(b)

Allegation E – Force: PO Glen Barker struck § 87(2)(b) with an asp.

Allegation F – Force: PO Dustin Dimpflmaier used a chokehold against § 87(2)(b)

Allegation G – Force: PO Dustin Dimpflmaier obstructed the breathing of § 87(2)(b)

§ 87(2)(b) (encl. [3A-L]) said that he initially encountered PO Barker and PO Dimpflmaier as he skateboarded southbound on the sidewalk of Lexington Avenue. He said that an unknown officer attempted to grab his left arm as he skateboarded but that he shrugged them off, that PO Barker and PO Dimpflmaier followed him to his destination, a convenience store on East 126th Street but he then left the convenience store to go back to 112 East 128th Street. § 87(2)(b) also said that when he entered the vestibule of 112 East 128th Street, he saw PO Antola or PO Fairclough signaling to him to come outside, but ignored them.

§ 87(2)(b) said that no officer ever told him that he was being stopped, why he was being stopped, or that he was under arrest, and that when he entered the lobby of 112 East 128th Street and either PO Antola or PO Fairclough attempted to grab him, he pulled away, turned around, and backpedaled deeper into the lobby, saying, “What is your reason for stopping me?” PO Barker then ran to him, knocked his skateboard out of his left hand, and grabbed him. § 87(2)(b) did not remember how he was grabbed. § 87(2)(b) continued to backpedal. While § 87(2)(b) initially acknowledged pushing or shoving PO Barker, he later retracted this and said that he in no way caused PO Barker to fall, and that PO Barker likely fell because he, PO Dimpflmaier, PO Antola, and PO Fairclough were all attempting to “rush” § 87(2)(b) at once.

§ 87(2)(b) alleged that after PO Barker fell, PO Dimpflmaier grabbed him with both hands behind his neck, pulled his head downwards, and repeatedly attempted to knee him in his face. § 87(2)(b) successfully blocked these blows and was not injured. PO Dimpflmaier then pulled him face-down to the ground. As § 87(2)(b) attempted to push himself back up, PO Dimpflmaier wrapped his arm around § 87(2)(b)'s neck from behind so that the crook of his elbow pressed against § 87(2)(b)'s throat. § 87(2)(b) could not estimate how long this hold lasted. He was not able to breathe or speak during the hold, which he attempted to fight off by pulling with both hands at PO Dimpflmaier's arm. Other officers in turn pulled on § 87(2)(b)'s arms, and PO Dimpflmaier eventually released him. While § 87(2)(b) was held in this fashion, PO Barker stood back up and struck him twice on the left shoulder with an asp, causing a bruise, a picture of which § 87(2)(b) provided (encl. [3J]). § 87(2)(b) was then held face-down on the ground until additional officers responded.

Attempts to contact a witness who recorded video footage from the lobby, identified by the investigation as § 87(2)(b) were not successful. Video footage was obtained both from the lobby of 112 East 128th Street and from § 87(2)(b) who posted the files on Instagram (encl. [7A-B]).

Video footage from the lobby shows that PO Antola attempted to grab § 87(2)(b) in the vestibule, but that § 87(2)(b) pulled away (encl. [7D-F]). As the video footage from the lobby lacks audio, it is not possible to tell if § 87(2)(b) or the officers speak. The lobby footage then shows that as § 87(2)(b) backpedaled into the lobby, PO Dimpflmaier and PO Barker were facing him (encl. [7G]). PO Barker reached and knocked the skateboard out of § 87(2)(b)'s right hand while PO Dimpflmaier reached for his left arm (encl. [7H-M]). Immediately after the skateboard is knocked from his hand, § 87(2)(b) swings his right arm in the direction of the officers, possibly attempting to strike them (encl. [7N]). It is not clear from the positioning of all parties whether or not § 87(2)(b) makes contact with either officer. PO Barker then places his hand on § 87(2)(b)'s chest and pushes him against the wall in between two elevators (encl. [7O-P]). § 87(2)(b) pushes his right arm forward; PO Barker grabs him by his right arm while PO Dimpflmaier grabs him by his left (encl. [7Q]). PO Barker then pulls § 87(2)(b) across the hall, so that § 87(2)(b)'s back makes contact with the wall opposite the elevators (encl. [7R-S]). § 87(2)(b) and the officers then swing back and again make contact with the wall in between the two elevators (encl. [7T-Y]). It is not possible to discern if this action is a result of § 87(2)(b) is pushing or because PO Barker and PO Dimpflmaier are pulling. PO Antola and PO Fairclough at this time approach (encl. [7V]). PO Dimpflmaier, PO Barker, and § 87(2)(b) all appear to fall towards the back wall (encl. [7W-Z]). Due to a number of civilians gathered in the hallway as well as the positions of PO Antola and PO Fairclough in the foreground, it is not possible to tell what causes them to fall.

§ 87(2)(b) stands up before PO Dimpflmaier and PO Barker (encl. [7AA-AB]). PO Antola and PO Fairclough appear to approach him and grab his arms. PO Dimpflmaier rises and grips § 87(2)(b) with both hands behind his neck, pulls his head downward, and twice attempts to knee him in his face (encl. [7AC-AL]). PO Dimpflmaier then holds § 87(2)(b)'s head down so that § 87(2)(b) is bent forward while PO Barker holds § 87(2)(b)'s right side, PO Antola holds his left, and PO Fairclough stands behind him (encl. [7AM]). PO Dimpflmaier slides his back down the wall opposite the elevators with § 87(2)(b) so that he comes to be crouching; PO Barker appears to request additional units via radio (encl. [7AN-AP]). They hold § 87(2)(b) in this position for a few seconds, at which time PO Antola, PO Dimpflmaier, and § 87(2)(b) tip over, with PO Dimpflmaier on his back beneath § 87(2)(b) (encl. [7AQ-AR]). PO Barker twice strikes § 87(2)(b) with his asp (encl. [7AS-AU]) as PO Dimpflmaier rolls to his side with § 87(2)(b).

PO Dimpflmaier then rolls on top of § 87(2)(b) and gains leverage to kneel or crouch, positioned behind § 87(2)(b). As he does so, he wraps one of his arms across the front of § 87(2)(b)'s throat (encl. [7AV-AX]), so that the crook of his elbow is pressed against the front of his neck (the video footage taken by § 87(2)(b) begins at this juncture (encl. [7BG-BK])). PO Dimpflmaier then pulls § 87(2)(b) backwards. The camera's view of § 87(2)(b) is then eclipsed both by PO Antola, who stands to § 87(2)(b)'s right, PO Barker, who stands to his left, PO Fairclough who stands in between them, and by § 87(2)(b) who stands in the foreground (encl. [7AY]). § 87(2)(b) then appears to be positioned back-down on top of PO Dimpflmaier with his legs extended outwards (encl. [7AZ]) and slightly bent at the knee; an asp is visible in the foreground, discarded on the floor § 87(2)(b) video footage stops at this juncture (encl. [7A-B])). Over the next few seconds, based upon the movements of the officers, it appears that § 87(2)(b) alternates between holding still and moving, but it is not clear how exactly he moves as the officers obscure his body, with PO Dimpflmaier positioned near his head, PO Antola at his upper torso, PO Fairclough at the top of his legs, and PO Barker by his feet (encl. [7BA]). Additional officers arrive, further obstructing the camera's view (encl. [7BB]). When § 87(2)(b) is next visible, additional officers are leaving, and he is lying prone on the ground at the end of the hallway, rear handcuffed and motionless (encl. [7BE-BF]).

The video footage thus confirms that during the struggle PO Dimpflmaier attempted to knee § 87(2)(b) in the face, that § 87(2)(b) came to be on the ground, that PO Barker struck him with an asp, and that PO Dimpflmaier used a chokehold against § 87(2)(b). It is not possible to determine from the video footage how long the chokehold lasted, as other officers after a few seconds eclipse the view of § 87(2)(b) and PO Dimpflmaier and due to the shifting positions of § 87(2)(b) and PO Dimpflmaier. It is also not possible to confirm from video footage any signs that § 87(2)(b) was unable to breathe, such as redness in his face or visible gasping for air.

The medical treatment of prisoner form confirms only that § 87(2)(b) had taser prongs in his back. The request for his arrest photograph was returned with negative results (encl. [5A-B]). Medical records from FDNY and § 87(2)(b) (see medical records folder) note that § 87(2)(b) had two taser prongs in his back. There were no other injuries noted to his person except an abrasion to his right bicep and a cut on his lower lip that was not actively bleeding. No respiratory distress was noted, nor did § 87(2)(b) complain of such. On multiple occasions in December of 2014 § 87(2)(b) went § 87(2)(b) for continuing mid- to lower-spinal pain stemming from this incident, was diagnosed with back spasms, and was given Robaxin to take when the spasms occurred. § 87(2)(b) also said that since this incident he has sought treatment for his back pain at § 87(2)(b), but a subpoena returned no results.

PO Dimpflmaier (encl. [4A-F]) said that he was concussed and consequently had no recollection of attempting to knee § 87(2)(b) in the face or of using a chokehold. He identified himself on the video footage as the officer using the chokehold, but reviewing the video footage did not refresh his recollection. As has already been discussed, police documentation, including § 87(2)(b)'s arrest report and PO Dimpflmaier's Line of Duty paperwork (encl. [5A-B]), confirm that PO Dimpflmaier sustained a concussion. As PO Dimpflmaier refused to sign HIPAA forms, the investigation has no means of obtaining his medical records and consequently no means of assessing the severity of the concussion. PO Dimpflmaier had difficulty in describing what physical actions he took during the struggle to handcuff § 87(2)(b) but remembered telling him numerous times, "Stop resisting," to no avail.

PO Barker (encl. [4G-L]) said his recollection of the incident was hazy as a result of the concussion he sustained and that he therefore did not remember using his asp against § 87(2)(b) or if PO Dimpflmaier used a chokehold. He did not remember having any indication that § 87(2)(b)'s breathing was restricted and reviewing video footage did not refresh his recollection.

PO Antola (encl. [4M-R]) did not remember PO Barker striking § 87(2)(b) with the asp and attempts to refresh her recollection were unsuccessful. Sgt. Zagajeski did not arrive on scene until after this use of physical force occurred (encl. [4S-Y]). Sgt. Zagajeski had no indication that § 87(2)(b)'s breathing was restricted and PO Antola did not remember having any such indication. As discussed previously, PO Fairclough could not be interviewed. On the arrest report PO Fairclough prepared for § 87(2)(b) he was charged with possession of a weapon in the fourth degree (encl. [5A-B]). PO Antola, PO Barker, and PO Dimpflmaier believed this charge probably referred to § 87(2)(b) using his skateboard as a weapon, although none of them remembered him ever attempting to strike an officer with the skateboard.

Officers must use the minimum force necessary to apprehend a resisting subject. Officers are prohibited from using chokeholds, which include, but are not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing to reduce intake of air. Patrol Guide Section 203-11 (encl. [1A-B])

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation H – Force: Sgt. Robert Zagajeski used a taser against § 87(2)(b)

It is not disputed that Sgt. Zagajeski used his taser against § 87(2)(b). It is disputed how § 87(2)(b) was behaving at the time the taser was used.

§ 87(2)(b) alleged that before he was tasered, an officer who he could not see said, “Move back. We’re going to tase him.” § 87(2)(b) moved to lie fully face-down on the ground with his hands interlocked behind his head. An officer who he could not see lifted up the back of his t-shirt. Seconds thereafter, an officer who § 87(2)(b) could not see discharged the taser so that the prongs entered his lower back. § 87(2)(b) heard officers saying, “Sir, please, give me your hands.” Once he was tasered, the officers handcuffed § 87(2)(b) and removed him from the scene.

§ 87(2)(b) was brought by EMS to § 87(2)(b), where two taser prongs were removed from his back (see medical records folder).

Sgt. Zagajeski said that when he used his taser against § 87(2)(b) § 87(2)(b) was on the ground on his back, swinging his fists and moving his torso from side to side. Officers were holding on to him, but Sgt. Zagajeski did not remember which officers, or how they held him. Sgt. Zagajeski decided to use his taser to overcome § 87(2)(b)'s active resistance. Sgt. Zagajeski lacked sufficient time to warn § 87(2)(b) that the taser would be used. Sgt. Zagajeski stood three to four feet from § 87(2)(b) and aimed the taser at his stomach. At the last second, § 87(2)(b) rolled over so that his back was to Sgt. Zagajeski. The taser prongs consequently made contact with his lower back. The taser was used for only one cycle, at which time § 87(2)(b)

§ 87(2)(b) became compliant and was handcuffed. The non-lethal restraining device report was generally consistent with Sgt. Zagajeski's statement (encl. [5A-B]).

PO Dimpflmaier said that before the taser was used against § 87(2)(b) § 87(2)(b) was positioned face-down on the ground with his hands tucked underneath his body. PO Dimpflmaier was on top of § 87(2)(b) attempting to pull his arms out from underneath him. PO Dimpflmaier heard an officer say his name and he stepped back. The last PO Dimpflmaier saw, § 87(2)(b) was still face-down on the ground, but once he stepped back he could no longer see § 87(2)(b) and how he was behaving. PO Barker did not remember how § 87(2)(b) was positioned or how he was behaving at the time the taser was used. PO Antola said that Sgt. Zagajeski told her to step back prior to using his taser against § 87(2)(b) and that she consequently released her grip on § 87(2)(b) and stepped back. PO Antola also thought Sgt. Zagajeski warned § 87(2)(b) prior to discharging the taser, but did not remember what was said. PO Antola did not remember how § 87(2)(b) was positioned, or how he was behaving exactly, at the time the taser was used.

Video footage is not helpful in determining how § 87(2)(b) was behaving at the time the taser was used. The first video file provided by § 87(2)(b) and the video footage from the lobby last shows that in the last moments before additional officers arrived and obscured § 87(2)(b) from the camera's view, he was positioned on the ground and was surrounded by PO Barker, PO Dimpflmaier, PO Antola, and PO Fairclough (encl. [7BA]). The second video taken by § 87(2)(b) (encl. [7B, 7BL]) depicts numerous officers standing in the hallway where § 87(2)(b) is arrested and for the large part obstructing the camera's view of § 87(2)(b). The distinctive sound of a taser is audible, as is the sound of § 87(2)(b) screaming and Sgt. Zagajeski yelling, "Give us your hands!"

A conducted energy device, or taser, should be used to provide safety for officers who might otherwise be forced to physically subdue a dangerous subject and is akin to other less-than-lethal devices, such as pepper spray and batons. A taser should only be used against individuals who are actively physically resisting, exhibiting active physical aggression, or to prevent individuals from physically injuring themselves or others. An officer must consider the totality of the circumstances when deciding to utilize a taser. The factors to be weighed include disparities in size, strength, or age between the officer and subject, the officer's perception of the subject's willingness to resist, the officer's perception of the immediate threat to the subject, members of service, or bystanders, the subject's violent history, and the officer's perception of the subject being under the influence of a stimulant or narcotics (encl. [1C-J]).

§ 87(2)(g)

§ 87(2)(g)

Team: _____

Investigator: _____
Signature Print Date

Supervisor: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date